No. 85-518

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES PINCKARD, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under *Leon* and *Sheppard*, reasonable grounds to believe that a corporation was engaged in fraudulent as well as legitimate activities could form the basis for an objectively reasonable belief on the part of law enforcement officers that the fourth amendment sanctioned a warrant authorizing the seizure of "all corporate records."

2. Whether, under *Leon*, an appellate court may remand a case for a limited rehearing on "good faith," excluding and therefore precluding inquiry into whether a search warrant affidavit was knowingly false or made with reckless disregard for the truth.

3. Whether, under *Leon*, an appellate court may remand a case for a limited rehearing on "good faith," excluding and therefore precluding inquiry into whether the warrant affidavit provided probable cause to search under the *Gates* standard.

4. Whether the rendering of findings of fact as to good faith by an appellate court in the absence of an evidentiary hearing on good faith or factual findings by a district court on that issue constitutes an advisory opinion.

PARTIES BEFORE THE COURT OF APPEALS

The United States of America, respondent herein, was the sole appellant before the Court of Appeals. Named as appellees below were James Pinckard, James F. Norton, Paul Fosco and Paul A. DiFranco, petitioners herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners James Pinckard, James F. Norton, Paul Fosco and Paul A. DiFranco respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 749 F.2d 1477. The District Court's order and findings, which were not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1985. The Court of Appeals denied petitioners' timely petition for rehearing by order entered on July 24, 1985. This petition for certiorari was filed within sixty (60) days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The controversy herein centers on the search of the offices of two corporations, Consultants & Administrators, Inc. ("C & A") and Pinckard and Associates, Inc. ("Pinckard"), by federal agents pursuant to warrants authorizing the search and seizure of "all corporate records." C & A is an Illinois corporation located in Chicago, Illinois,

engaged in the business of contracting with various labor unions to provide dental and vision services to its members and their families. Pinckard worked under contract to C & A and was responsible for verifying the eligibility of persons receiving health services from C & A. At the time of the search, petitioner James F. Norton was president of C & A and petitioner Paul Fosco was a vice-president. Petitioner James Pinckard was president of Pinckard.

Federal law enforcement officers, under the supervision of Special Agent James W. Wagner, conducted simultaneous searches of the corporations' offices on October 6, 1976. The searches were conducted pursuant to warrants issued by a federal magistrate in Chicago on October 5, 1976. The warrants issued on the basis of an affidavit, sworn to by Agent Wagner on October 5, 1976, recounting information obtained from Daniel G. Milano, Jr. Appendix at 25. Milano had served as secretary-treasurer of C & A from December, 1972 through July, 1976, at which time he quit as a result of a dispute with his father, Daniel Milano, Sr., then executive vice-president and chief executive officer of C & A. The affidavit relates that Milano described to Wagner a kickback scheme aimed at securing labor union contracts for C & A. The affidavit attests that C & A "provides medical, dental and vision services to union members and their families", Appendix at 25, and that it contracted with Pinckard "to verify the eligibility of persons receiving services from Consultants under its union contracts". Appendix at 26. According to Milano, however, Pinckard also functioned as a conduit to divert revenue from C & A to be used to finance the alleged kickback scheme. Milano stated that under an agreement between Milano, Sr. and Alfred Pilotto, a Chicago union official and Pinckard's father-in-law,

James Pinckard would contact him monthly to ascertain the monthly total of gross premiums paid to C & A on its contracts, and that James Pinckard would then bill C & A in an amount representing ten percent of total quoted to him by Milano. Appendix at 28.

Upon the presentation of Wagner's affidavit, the magistrate approved the warrants. The warrant for C & A authorized the seizure of:

> *all corporate records* of Consultants and Administrators, Inc.; a black vinyl book, approximately six inches wide by twelve inches long, containing copies of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code. (Emphasis added.)

Appendix at 21. The warrant for Pinckard commanded the seizure of:

> *all corporate records* of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code. (Emphasis added.)

Appendix at 23. On the Government's motion, the magistrate ordered the affidavit impounded, and consequently, it did not accompany the agents conducting the search.

The agents searched throughout the offices of both corporations. The search at C & A included not only the storage room where business files were maintained, but also the desks, credenzas and file cabinets, containing personal as well as work-related materials, of all officers and intermediate level employees. Segregated documents in C & A's file cabinets pertaining to Dental and Vision Care Centers, Inc. and its president, petitioner Paul A. DiFranco, were also examined. The agents seized eighteen cartons

of materials from C & A. The search at Pinckard was equally broad in scope, resulting in the seizure of documents and other materials from file cabinets and the desks of various Pinckard employees, including James Pinckard. Illustrative of the scope of the search is the agents' seizure of an employee's property tax bill.

In June, 1981, a Miami grand jury returned an indictment charging petitioners and twelve other individuals with violations of the racketeering laws, 18 U.S.C. § 1962(d). Thereafter, petitioners filed a joint motion to suppress the documents seized during the searches of C & A's and Pinckard's offices. Petitioners contended the searches were illegal on several grounds, including: (1) the impermissibly general description in the warrant; (2) the overbroad authorization to seize "all corporate records" for which there was not probable cause; and (3) the inclusion of material misrepresentations and errors, either intentionally or recklessly, in the warrant affidavit. Filed with the motion were thirteen affidavits attesting to the numerous and repeated inaccuracies and misrepresentations contained in the affidavit.

After a hearing, the District Court held that the warrants were "impermissibly general" and ordered all materials seized pursuant to the warrants, excluding some items not disputed herein, suppressed.[1] The District Court rejected the Government's argument that there was probable cause to support the seizure of all corporate records

[1] The District Court found that "the defendant Pinckard has standing to challenge only the search of Pinckard and Associates and its fruits, and the defendants Fosco, Norton, and DiFranco have standing only to challenge the search of C & A and its fruits." Appendix at 11. The Government did not challenge standing in its appeal to the Eleventh Circuit.

of C & A and Pinckard on the premise that each corporation had "no business which did not involve kickbacks." Appendix at 12. The court specifically found that each enterprise performed "legitimate functions" which were "presumably memorialized in corporate records not subject to seizure by the government." *Id.* Noting that "[i]t would be difficult to imagine language more generic than 'all corporate records' ", *id.*, the court concluded that "[i]f these warrants are upheld the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized." *Id.* at 16.

The Government appealed pursuant to 18 U.S.C. § 3731, and the United States Court of Appeals for the Eleventh Circuit vacated the District Court's order and remanded the case for further proceedings. The Court of Appeals analyzed the case under the rubric of the "good faith" exception to the fourth amendment exclusionary rule established in *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Noting that the federal agents had submitted a "detailed affidavit" to a magistrate and that the affidavit had been reviewed by several attorneys in the U.S. Attorney's office, the Court of Appeals concluded that "[t]he agents here 'took every step that could reasonably be expected of them'," *quoting Massachusetts v. Sheppard*, 104 S.Ct. at 3429, 82 L.Ed.2d at 744. It continued:

> Moreover, the warrant's authorization to seize "all corporate records" does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants "so facially deficient—*i.e.*, failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."

> 104 S.Ct. at 3422. Arguably, "all corporate records" is significantly more general than the "any controlled substance" language contained in the *Sheppard* warrant. 104 S.Ct. at 3427 & n.2. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it. This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant," *id.* at 3429 n.7 (quoting *Illinois v. Gates*, 462 U.S. 213 at ____, 103 S.Ct. 2317 at 2345, 76 L.Ed.2d 527). In addition, the investigating officers were told by a former C & A executive that Pinckard was a sham corporation. Every indication was that C & A officials were extensively involved in the kickback scheme. This type of complex financial fraud, sometimes referred to as the "paper puzzle", has been held to justify a more flexible reading of the fourth amendment particularity requirement. *See, e.g., United States v. Wuagneux*, 683 F.2d 1343, 1348-50 (11th Cir. 1982) (citing cases), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).

Appendix at 7-8, 749 F.2d at 1481 (footnote omitted). The Court of Appeals concluded that "[o]n the facts considered by the district court in deciding whether to grant the motion to suppress, the good faith of the officers would be established." *Id.* Recognizing, however, that neither the lower court nor the parties had considered the officers' good faith at the time of the original hearing, the court remanded the case to the District Court for "a hearing on the good faith issue." Appendix at 9, 749 F.2d at 1481.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISIONS IN *LEON* AND *SHEPPARD*, AND IT RAISES IMPORTANT QUESTIONS UNDER THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE.

This Court recently established, in *United States v. Leon*, ____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), a "good faith" exception to the exclusionary rule. Reasoning that the rule is designed to deter police misconduct and is efficacious only insofar as it is directed at deliberate or negligent violations of the fourth amendment, the Court held that evidence obtained in reasonable reliance on a search warrant subsequently invalidated on probable cause grounds is not subject to exclusion. The Court made clear that the inquiry is strictly an objective one. 104 S.Ct. at 3421 n.23. The determinative issue is "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.*

Applying the *Leon* rule, the Court then held, in the companion case of *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), that the exclusionary rule does not require the suppression of evidence seized by police officers acting in objectively reasonable reliance on a technically defective warrant. In that case probable cause plainly existed, and it was particularized with respect to each of the items listed in the officer's affidavit. 104 S.Ct. at 3428-29. The scope of the search was limited to the items there listed. *Id.* at 3428. The only constitutional defect in the search was that the magistrate, having been given a controlled-substances warrant form by the officer, failed to make the necessary

changes in the form so as to make it conform to the affidavit, despite having assured the officer he had done so. *Id.* at 3427, 3429-30. The police conduct was thus objectively reasonable. *Id.* at 3429. The only error of constitutional dimension was committed by the magistrate, and it was merely "technical"—a failure "to make all necessary clerical changes" on the warrant form. *Id.* at 3426, 3430.

Relying upon what it understood to be the principles underlying this Court's decisions in *Leon* and *Sheppard*, the Eleventh Circuit here held that reasonable grounds to believe that a corporation was engaged, in part, in fraudulent activities could form the basis for an objectively reasonable belief that a warrant authorizing the seizure of "all corporate records" was valid under the fourth amendment. Appendix at 7-8; 749 F.2d at 1481. In so holding, the Eleventh Circuit's decision conflicts in principle with this Court's decisions in *Leon* and *Sheppard* in important respects:

(1) This Court recognized in *Leon* three classes of cases in which "good faith" would not exist as a matter of law. 104 S.Ct. at 3421-22. One class comprises cases involving warrants "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at 3422 (citation omitted). Such a warrant strikes at the heart of the fourth amendment, as its principal purpose was to prevent general searches. *E.g.*, *Payton v. New York*, 445 U.S. 573, 583-84 (1980). As Professor Taylor has written:

> Our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough

> that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as authority for unreasonable and oppressive searches. . . .

T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969).

The warrants here provided, in relevant part, for the seizure of "all corporate records" of C & A and Pinckard. Appendix at 21, 23. The breadth of the searches and seizures conducted pursuant to the warrants cannot be overstated. With respect to the search and seizure at C & A's offices, for example, about fifteen FBI agents, led by the affiant, participated. They rummaged through credenzas, desks, and personal papers; they took not merely the corporate records of C & A, but any records "associated with" C & A; they took any record of another company which mentioned C & A in any way; they took personnel records of C & A employees; they took, in all, about eighteen boxes stuffed with miscellaneous papers and left behind a nineteen page inventory.

While recognizing the generality of the language "all corporate records," the Eleventh Circuit held that this warrant was not so "facially deficient," *Leon*, 104 S.Ct. at 3422, that the agents should have known that it and their subsequent search was invalid under the fourth amendment. Appendix at 7-8; 749 F.2d at 1481. The Court based its holding on the fact that the investigating officers had reasonable grounds to believe that the corporations not only performed legitimate functions,[2] but engaged in

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[2] C & A was described in the affidavit as "provid[ing] medical, dental, and vision services to union members and their families." Appendix at 25. The affidavit states that Pinckard "verif[ied] the eligibility of persons receiving services from [C & A] under its union contracts." *Id.* at 26.

illegal activities as well (*i.e.*, making payoffs to union officials to ensure that bids on service contracts were approved). Appendix at 2, 8; 749 F.2d at 1478, 1481. The Court thus reasoned that reasonable grounds to believe that a corporation is engaged, in part, in fraudulent activities can form the basis for an objectively reasonable belief on the part of "a reasonably well-trained officer" that reliance on a general warrant, providing for the seizure of "all corporate records," is valid under the fourth amendment. *Leon*, 104 S.Ct. at 3421 n.23.

The Court's conclusion does not, we submit, follow from its premise. Moreover, the Court's holding and reasoning conflict in principle with *Leon*. This Court there recognized that a warrant raising the paradigmatic evil at which the fourth amendment was addressed—*i.e.*, unreasonable and oppressive searches and seizures authorized by generally worded warrant—cannot, as a matter of law, be reasonably relied upon by a well-trained officer. 104 S.Ct. at 3422. The Eleventh Circuit's contrary holding reduces the exclusionary rule, and by extension the fourth amendment, to an empty shell.

(2) The Eleventh Circuit's decision relies heavily on an analogy to this Court's decision in *Sheppard*. Appendix at 7; 749 F.2d at 1480-81. The two cases could not, however, be more different. There the specter of a general warrant was not raised, as (i) the items sought were particularized in the affidavit, (ii) probable cause existed as to each, (iii) the affidavit accompanied the officers on the search, and (iv) the scope of the search was limited to the items listed in the affidavit. 104 S.Ct. at 3427-38. Here, however, the warrants and the ensuing searches and seizures presented the very dangers and resulting harms that were associated with the general warrant early in our country's history. The items sought were not

particularized in the affidavit. It, too, used the language "all corporate records." Appendix at 32, 33. The facts alleged in the affidavit made clear that probable cause existed as to, at most, only a discrete segment of the corporations' records and not as to "all corporate records." *Id.* The searches and seizures amounted to a general rummaging through the corporations' offices and a wholesale carting away of papers of every conceivable stripe. The Eleventh Circuit's decision thus does not apply the principles that underlay *Sheppard*; rather, it conflicts with them.

Not only does the Eleventh Circuit's decision conflict in principle with *Leon* and *Sheppard*, it also presents important questions under the fourth amendment and the exclusionary rule. These questions have wide-ranging importance given the prevalence of investigations of crimes allegedly committed by and/or through corporations and other entities such as unions, unincorporated associations, investment firms and law firms. Among the questions raised are:

(1) Under what, if any, circumstances could a law enforcement officer have an objectively reasonable belief that a warrant authorizing the seizure of "all corporate records" was valid under the fourth amendment? *Leon* teaches that the issue whether a warrant is so "facially deficient . . . that the officers cannot reasonably presume it to be valid" may well require consideration of the "circumstances of the particular case." 104 S.Ct. at 3422. It provides no guidance, however, as to what circumstances are to be considered, or in what manner.

(2) What role does the participation of prosecutors in the preparation of an affidavit and warrant play in the "good faith" analysis? *Leon* addresses only the conduct of the police and magistrates. Its analysis suggests, how-

ever, that the deterrence rationale of the exclusionary rule applies as well to prosecutors and, therefore, "bad faith" on their part should result in exclusion. *See, e.g.*, 104 S.Ct. at 3418-19. *See generally Coolidge v. New Hampshire*, 403 U.S. 443, 450-53 (1971). Yet the Eleventh Circuit here appeared to analyze the prosecutors' involvement solely in terms of the "good faith" evidenced thereby on the part of the agents. Appendix at 7; 749 F.2d at 1480. The question is both unresolved and significant.

Because the Eleventh Circuit's decision thus conflicts in principle with *Leon* and *Sheppard*, and because it raises important unresolved questions under the fourth amendment and the exclusionary rule, the writ of certiorari should, we respectfully submit, be granted.

THE ELEVENTH CIRCUIT'S LIMITED REMAND ON THE QUESTION OF GOOD FAITH IS CONTRARY TO THE HOLDING IN *LEON* AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS, WILL PRECLUDE DEFENDANTS FROM DEMONSTRATING THAT THE WARRANT AFFIDAVIT WAS FALSE OR MADE IN RECKLESS DISREGARD OF THE TRUTH AND WILL CAUSE LEGALLY INCONSISTENT RULINGS IN THE LOWER COURTS.

In vacating the suppression order of the District Court and ordering a remand for a hearing on good faith pursuant to *United States v. Leon, supra*, the Eleventh Circuit compounded an error of the District Court denying petitioners' *Franks* motion. It is essential that petitioners be permitted a full opportunity to challenge whether Agent Wagner's affidavit was knowingly false or made in reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154 (1978). However, the limited remand ordered deprives petitioners this opportunity and, in essence, instructs the District Court to make certain findings of fact on a yet

to be held hearing. As the Eleventh Circuit's decision is contrary to the express pronouncements of this Court in *Leon* and conflicts with the opinions of other courts, the instant petition should be granted.

In limiting the remand hearing to good faith, the Eleventh Circuit bars inquiry of the reckless disregard of the agent affiant, on whose attestations the warrant in question was issued. This is especially egregious now that *Leon* has come to be the law of the land because under *Leon*, it is essential that any questions relating to the falsity or reckless disregard of the affiant be resolved *prior* to a determination of the good faith question. *State v. Schaffer*, 107 Idaho 812, 693 P.2d 458 (App. 1984). This Court's decision in *Leon* specifically carved out a *Franks*-type exception to the good faith rule: "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." 104 S.Ct. at 3421. In *Leon*, the Court further stated that "suppression is appropriate . . . if the officers were dishonest or reckless in preparing their affidavit." *Id.* at 3423.

The District Court summarily resolved petitioners' *Franks* motion after finding the warrant unconstitutionally general. The sole discussion by the court consisted of the following:

> Further, although the defendants contend, with supporting affidavits, that there are material false representations in the affidavit, the facts contested for the most part go to the general issues in the case and must await trial. Indeed, many of the claimed misrepresentations were made not by the affiant agent, but by the informant. Appendix at 17.

Leon points to the necessity of having the knowing or reckless reporting of false information reevaluated by the trial court prior to any determination of the executing officers' good faith. As noted in *United States v. Boyce*, 601 F.Supp. 947 (D.Minn. 1985), unlike *Franks*, the *Leon* decision makes no reference to a materiality requirement where a search warrant is concerned. *Id.* at 955, *citing United States v. Segovia-Melgar*, 595 F.Supp. 753, 757 (D.D.C., 1984). The *Boyce* court thus concluded that once a court finds a search warrant affiant to be dishonest or reckless, suppression is appropriate under *Leon* regardless of whether or not the misrepresentation or omission would be material under *Franks*. *Id.* at 955. Accordingly, under *Leon*, which the Court of Appeals relied on, even if the affidavit's falsities went to the general issues in the case, as stated by the trial court, that is not sufficient to sustain the warrant. Rather, under *Leon*, petitioners must have an opportunity to litigate *Franks*-related questions *prior* to and exclusive of any determination of good faith. As the Eleventh Circuit's decision precludes this necessary opportunity which was intended by this Court in *Leon*, the instant petition should be granted and the court of appeals' decision reversed or modified.

Just as *Leon* did not incorporate *Franks'* requirement of materiality, neither is it limited to *Franks'* limited question of the "integrity of the affiant's representations as to his own activities." *Franks*, 438 U.S. at 170. Thus, Judge Kehoe's decision based on the fact that the "claimed misrepresentations were made not by the affiant agent but by the informant" is not dispositive of petitioners' rights under *Leon* to challenge the affiant's reckless disregard of the truth in submitting his affidavit to the magistrate. At the least, the instant petition should be granted so this Court may clarify for litigants and lower courts the

distinctions between challenges to affidavits under *Franks* and *Leon*. Moreover, *Boyce* and *Schaffer* recognize that *Franks*-related considerations must be addressed prior to any determinations of good faith. Thus, this Court should grant certiorari to clarify these issues.

The record on appeal supports the merits of petitioners' position. Thirteen defense affidavits were submitted to the trial court demonstrating the blatant falsity of the affidavit of Agent Wagner. Moreover, subsequent to the trial court's ruling on petitioners' motion, the informant, Daniel Milano, Jr., testified that he never read Wagner's affidavit and that he did not ever recall telling Wagner that he made kickbacks of $1,000.00 per month to Daniel Milano, Sr., contrary to that asserted in Wagner's affidavit (Tr. 3185-87, 3217-18). Indeed, Milano's testimony proved it would have been impossible for the kickbacks asserted in the Wagner affidavit to have been made (Tr. 3217-3218). Thus, even if a post-*Leon* inquiry into the false or reckless nature of an affidavit is to be construed by the limitations of *Franks*, petitioners would be able to meet that burden. However, the Court of Appeals' decision precludes the inquiry recognized by this Court as a specific exception to the good faith rule.

Because this Court specifically carved out a *Franks*-type exception to the good faith rule of *Leon* and because it is only after a resolution of such exception that good faith should be addressed, the limited remand ordered by the Court of Appeals is unduly restrictive and will lead to a violation of petitioners' fourth amendment rights. Accordingly, certiorari should be granted.

THE ELEVENTH CIRCUIT'S LIMITED REMAND ON THE QUESTION OF GOOD FAITH IS CONTRARY TO *LEON* AND CONFLICTS WITH DECISIONS OF OTHER COURTS.

The Eleventh Circuit's limited remand for rehearing on the issue of the law enforcement officers' good faith also precludes petitioners from challenging whether the warrant affidavit established probable cause under the principles announced in *Illinois v. Gates*, 462 U.S. 213 (1983). Petitioners challenged the warrants on probable cause grounds in their motion to suppress, but the District Court, presumably applying the then extant *Aquilar-Spinelli* standards, found that probable cause existed "to support a properly limited search of the two corporate premises." Appendix at 16-17. The limited remand in the instant case conflicts with *Leon*, and decisions construing the holding therein, in that it prevents the District Court on remand from deciding, prior to ruling on the officers' good faith, whether probable cause exists under the new *Gates* standard. Thus, the Eleventh Circuit's decision raises important questions relating to the procedural sequence for resolving fourth amendment claims in relation to the good faith exception to the exclusionary rule.

In *Leon*, this Court adopted a policy allowing *trial courts*, exercising an "informed discretion," to decide for themselves whether to rule on fourth amendment challenges prior to considering the officers' good faith. The Court stated:

> If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth

> Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith.

Leon, 104 S.Ct. at 3422-23.

The Eleventh Circuit's remand order, directing the trial court to "determine whether the officers acted in good faith," Appendix at 9, 749 F.2d at 1481, prevents the District Court from exercising the discretion this Court in *Leon* granted to trial courts. As a consequence of the limited remand ordered, petitioners are barred from seeking a reconsideration of the District Court's initial ruling on the probable cause question. Petitioners are thereby prejudiced in two respects. First, the law concerning probable cause has undergone significant revision since the time of the District Court's decision. It is critical, therefore, that the court decide anew whether "the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates, supra* . . ." *Leon,* 104 S.Ct. at 3417. Second, evidence has come to light since the court's initial probable cause ruling which demonstrates that the affidavit contains inaccuracies that undermine any basis for finding probable cause. As indicated above, *infra* at 16, the informant has testified under oath that he could not recall telling the affiant certain items alleged in the affidavit.

This Court should grant the writ to clarify the respective powers of trial courts and appellate courts in dealing with good faith questions. Guidance is also needed on

the procedural sequence for deciding fourth amendment claims in relation to the good faith exception. The decision below is contrary to the emerging post-*Leon* practice among district courts of deciding probable cause questions prior to considering good faith. *See United States v. Gallo*, 599 F.Supp. 241, 246 (W.D.N.Y. 1984); *United States v. Steerwell Leisure Corp.*, 598 F.Supp. 171, 174 (W.D.N.Y. 1984); *United States v. Granger*, 596 F.Supp. 665 (W.D. Wis. 1984). Finally, guidance is needed on what constitutes the exercise of an "informed discretion" when deciding the proper sequence for ruling on good faith and fourth amendment questions. *Leon* is silent on this important issue. Because these questions are of broad import to both state and federal courts, the Court should grant the writ.

THE DECISION BELOW IS AN ADVISORY OPINION IN CONTRAVENTION OF ARTICLE III OF THE CONSTITUTION AND IN CONFLICT WITH THE RULINGS OF THIS COURT.

The hearing on petitioners' motion to suppress pre-dated this Court's decision in *United States v. Leon, supra.* Consequently, a record was never made below on the question of good faith nor was that issue relevant at the time. After the *Leon* and *Sheppard* decisions, it was clear that this case was not in a posture to be *acted upon* on the question of good faith by the Court of Appeals because of the lack of an evidentiary hearing on this point in the District Court. Likewise, the court could not *adjudicate* the contentions of the parties hereto for the same reason. Despite the lack of hearing, the Court of Appeals went on to render an advisory opinion, stating that ". . . the pending appeal is within the good faith exception articulated in *Leon* and *Sheppard.*" Appendix at 7, 749 F.2d at 1480. Since there was no evidentiary hearing on good

faith and no factual findings by the District Court on that subject, it was inappropriate for the court to state that this case fell within the good faith exception and certiorari should be granted.[3]

It has long been held that federal courts established pursuant to Article III of the Constitution do not render advisory opinions. "[And] it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.' " *Flast v. Cohen*, 392 U.S. 83, 96 (1968), *citing* C. Wright, *Federal Courts* 34 (1963). *Accord, North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

The Court of Appeals rendered its advisory opinion despite its realization that it had not ". . . had the opportunity to consider all the circumstances in this case. . . ." Appendix at 8, 749 F.2d at 1481. Clearly, then, there was not a fully developed record for the court to act upon. The fact that the record was incomplete further highlights the advisory nature of the court's gratuitous comments. As this Court has noted, "such advance expressions of legal judgment upon issues which remain unfocused . . ." are clearly advisory. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). *See California Bankers Association v. Schultz*, 416 U.S. 21, 56 (1974) (concrete fact situation needed for determination); *Zemel v. Rusk*, 381 U.S. 1, 20 (1965) (concrete fact situation needed to avoid advisory opinions); *Lathrop v. Donahue*, 367 U.S. 820, 847 (1961) (incomplete record prevents determination); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (concrete facts, not

[3] Perhaps recognizing these infirmities, the Honorable Homer Thornberry concurred specially only in that portion of the opinion remanding because of the lack of an evidentiary hearing. Appendix at 9, 741 F.2d at 1481.

abstractions, necessary to avoid advisory opinions). It is obvious that the Court of Appeals' opinion is squarely at odds with the longstanding precedent of this Court.

Accordingly, it was wholly inappropriate and unnecessary for the court to determine, among other things:

(1) This case was within the good faith exception of *Leon* and *Sheppard*, Appendix at 7, 749 F.2d at 1480;

(2) "The agents here 'took every step that could reasonably be expected of them'," *id.*;

(3) The relevance of the magistrate's actions and the expectations of the agents, *id.*;

(4) The adequacy of facial deficiency of the warrant, *id.* at 1481;

(5) Whether the magistrate had any "business" issuing the warrant, *id.*; and

(6) On the facts below, ". . . the good faith of the officers would be established," Appendix at 8, 749 F.2d at 1481.

All of the above determinations and other factual determinations by the Eleventh Circuit were premature, based on incomplete facts and made in advance of the forthcoming evidentiary hearing. These explicit pronouncements by the court were not only advisory, but highly prejudicial to petitioners. Even though the court remanded for a good faith hearing, its pronouncements appear to settle the very question which is supposed to be determined by the remand, i.e., the issue of good faith. Given the circumstances of the court's opinion, it is manifest that the lower court will be reluctant to challenge the remanding court's advisory determinations. Below, petitioners will not only be faced with the task of establishing their posi-

tion, they will also have to overcome the Court of Appeals' advisory opinion. This additional burden is inherently unfair. Because the Court of Appeals' opinion was advisory in nature, contrary to the long standing tenets of Article III of the Constitution and is prejudicial to petitioners, certiorari is requested to correct this injustice and the disharmony caused by its decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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UNITED STATES of America,
Plaintiff-Appellant,
Cross-Appellee,

v.

Anthony ACCARDO, et al.,
Defendants-Appellees,
Cross-Appellants.

No. 82-5380.

United States Court of Appeals,
Eleventh Circuit.

Jan. 8, 1985.

Defendants moved to suppress evidence seized under search warrant, and the United States District Court for the Southern District of Florida, James W. Kehoe, J., granted the motion. On the Government's interlocutory appeal, the Court of Appeals, James C. Hill, Circuit Judge, held that the remand to district court was appropriate for determination whether good-faith exception to Fourth Amendment exclusionary rule applied, where district court conducted suppression hearing and, without considering whether there was a good-faith exception, found search warrant unconstitutionally general and suppressed evidence seized thereunder.

Vacated and case remanded.

Thornberry, Senior Circuit Judge, sitting by designation, concurred specially and filed opinion.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

CORRECTED OPINION

JAMES C. HILL, Circuit Judge:

This appeal requires us to consider the good faith exception to the fourth amendment exclusionary rule, recently established by the Supreme Court in *United States v. Leon*,____ U.S. ____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard*, ____ U.S. ____, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). In light of these 1984 decisions, we vacate the 1982 district court order, which suppressed evidence seized by officers under a warrant held by the district court to have been insufficiently particular to meet fourth amendment standards, and remand this case to the district court to determine whether those officers acted in good faith.

We briefly summarize the material facts considered by the district court in deciding whether to grant the motion to suppress. Federal agents in Chicago suspected several health care services companies of labor racketeering activities. Their investigation led them to Daniel G. Milano, Jr., a former officer of one of the companies under suspicion, Consultant and Administrators, Inc. (C & A). Milano, whose father was executive vice-president of C & A, told FBI agents that C & A paid labor union officials kickbacks to ensure that all C & A bids for union health services contracts were approved. According to Milano, C & A officials formed two companies, Pinckard and Associates, Inc. (Pinckard), and Fortune Services, to divert revenue from C & A into a kickback fund from which labor leaders were paid. Although Pinckard and Fortune primarily served as conduits for the payoff scheme, the companies also performed the task of verifying eligibility for coverage under the C & A contracts with the unions. Milano fully described the billing procedures used by Pinckard and Fortune, the manner in which illegal payments were made, and the collection of monthly cash contributions from C & A officers for distribution to union officials.

At the conclusion of this investigation, an FBI agent swore out an affidavit in which he recounted Milano's description of the alleged kickback scheme. The affidavit detailed the completeness of the fraud that permeated the business dealings between the companies involved. Based on that affidavit, a federal magistrate in Chicago issued warrants authorizing the search of the administrative offices of C & A and Pinckard. Federal agents conducted such a search and seized several volumes of documents from both companies.

Racketeering charges were then filed in the District Court for the Southern District of Florida against various labor leaders and officers of C & A and Pinckard.[1]

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[1] An independent federal investigation in Miami apparently led authorities there to suspect several of the figures under investigation in Chicago of similar criminal activity in Florida. Indeed, a federal grand jury in Miami issued subpoenas *duces tecum* to various C & A and Pinckard officers and defendant-appellee Di Franco, requiring them to produce most of the materials seized in the search now under attack. The district court ruled that the documents obtained by the subpoena were not tainted by the illegal searches and denied suppression motions as to that evidence. Whether the materials seized in the challenged search are thus subject to the "independent source" rule, *see Segura v. United States*, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), or the "inevitable discovery" doctrine, *see United States v. Kroesser*, 731 F.2d 1509 (11th Cir. 1984), are questions we need not decide.

We also see no reason to consider whether defendants-appellees can invoke the interlocutory appeal provisions of 18 U.S.C. § 3731, *see United States v. Moody*, 485 F.2d 531, 534 (3d Cir. 1973) (allowing cross-appeal), to challenge the district court's refusal to suppress the evidence obtained by subpoena. Since we vacate the order suppressing the records seized in the C & A and Pinckard searches, the order defendants-appellees seek to appeal may be unnecessary to the district court's disposition of the suppression motions. Whether this is the case depends on how the district court resolves the good faith issue on remand. *See infra*, 1479-80. This court therefore will wait for resolution of that issue and not address herein the question involving invocation of the interlocutory appeal provisions of 18 U.S.C. § 3731.

Shortly after they were indicted, defendants[2] moved to suppress all materials seized in the C & A and Pinckard searches. The district court conducted a suppression hearing, and, finding the warrant issued by the Chicago magistrate "unconstitutionally general," suppressed the corporate records seized from the offices of C & A and Pinckard. At the hearing, the district court did not consider whether there was a good faith exception to the fourth amendment exclusionary rule, nor whether the FBI agents had acted in good faith. The United States subsequently brought this interlocutory appeal pursuant to 18 U.S.C. § 3731 (1976), challenging the district court's suppression order on the ground that the officers had acted in good faith.[3] We now vacate and remand.

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[2] At the time these charges were filed, defendant-appellee Pinckard was president of Pinckard and Associates, Inc.; defendant-appellee Fosco was president of PF Insurance Agency and vice-president of C & A, Inc.; and defendant-appellee Norton was president of C & A, Inc.; and defendant-appellee Di Franco was vice-president of Dental and Vision Care Centers, Inc., a company that allegedly provided kickback monies to receive union health care business. *See* Supp. Record on Appeal at 1-14.

The district court found that among the twelve named codefendants only Pinckard, Fosco, Norton and Di Franco had standing to challenge the searches. Therefore, they are the only parties to the government's appeal.

[3] The Government did not originally challenge the district court's conclusion that the warrants were impermissibly general, *see Stanford v. Texas*, 379 U.S. 476, 481-86, 85 S.Ct. 506, 509-12, 13 L.Ed. 2d 431 (1965), instead urging this court to extend our ruling in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981), to encompass the officers' actions in this case. *See* Brief for Appellant at 13-26.

Shortly before this case was orally argued, however, the government submitted authorities that supported the validity of broad warrants covering searches of businesses permeated with fraud. *See, e.g., United States v. Offices Known As 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983). While we chose to dispose of this appeal as it was briefed by all parties, we note that the af-

(Footnote continued on following page)

Since the district court issued the suppression order in 1982, the Supreme Court has held that there is a good faith exception to the exclusionary rule. In *United States v. Leon* the Supreme Court considered "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 104 S.Ct. at 3409. The Court answered that question by taking yet another look at the remedial objectives thought served by the exclusionary rule. *Id.* at 3413-16. Concluding that the rule remains viable only as a deterrent to police misconduct, the Court held that the costs to the administration of justice of excluding highly probative evidence outweighed any benefits from the rule's deterrent effect where police officers have acted in objectively reasonable reliance on a warrant later found to be defective. *Id.* at 3419-21. With certain well-defined limitations,[4] the rule announced by the Court required

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[3] *continued*
fidavit supporting the C & A and Pinckard search warrants alleged that Pinckard was incorporated solely as a conduit for the flow of kickback monies. Thus, at least with respect to Pinckard, the magistrate who issued these warrants might have had reason to authorize the seizure of "all corporate records." *See, e.g., United States v. Brien*, 617 F.2d 299, 305-09 (1st Cir.) (approving warrant authorizing seizure of materials that made up "most of the business records" of investment firm), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980); *see generally United States v. Wuagneux*, 683 F.2d 1343, 1348-51 (11th Cir. 1982) (collecting cases on warrants in context of complex, fraudulent business schemes), *cert. denied*, ___ U.S. ___, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).

[4] The Court explained three instances where, although the officer has acted in good faith, suppression remains an appropriate remedy:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*,

(Footnote continued on following page)

suppression "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 3423. Then, turning to the facts before it, the Court found the officers' reliance on the magistrate's determination of probable cause to be reasonable; the warrant was supported by much more than a "bare bones" affidavit and was not seriously challenged by any of the defendants. Under those circumstances, the Court discerned no reason for applying the "extreme sanction of exclusion." *Id.* at 3423.

Massachusetts v. Sheppard presented a situation seemingly analogous to the case before this court. In *Sheppard* the trial judge suppressed evidence seized during the execution of a warrant that failed to describe with particularity the items to be seized. 104 S.Ct. at 3428. The Supreme Judicial Court of Massachusetts refused to recognize a good faith exception to the exclusionary rule and affirmed. The Supreme Court reversed, emphasizing that the officers had evidenced their good faith by submitting an affidavit to a judge, who then drafted a warrant authorizing the search. *Id.* at 3429. Any error in fail-

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[4] *continued*

442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. [590] at 610-611, 95 S.Ct. [2254] at 2265-2266 [45 L.Ed.2d 416 (1975)] (POWELL, J., concurring in part); *see Illinois v. Gates, supra*, 462 U.S. [213] at [246], 103 S.Ct. [2317] at [2336] [76 L.Ed.2d 527 (1983)] (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, ____ U.S., at ____, 104 S.Ct. at ____.

104 S.Ct. at 3422.

ing to meet the particularity requirement of the fourth amendment, the Court held, was committed by the judge, not the police officers. *Id.* Therefore, the officers' conduct was objectively reasonable and well within the bounds of the rule announced in *Leon.*

On the facts considered by the district court at the suppression hearing, the pending appeal is within the good faith exception articulated in *Leon* and *Sheppard.* The agents here "took every step that could reasonably be expected of them." *Id.* As in *Sheppard,* the agents submitted a detailed affidavit to a magistrate in order to secure the search warrants. The affidavit alleged a pervasive fraud that had resulted in the incorporation of a sham business to channel kickback monies to labor officials. In addition, the affidavit was reviewed by several attorneys in the U.S. Attorney's office before it was presented to a magistrate, who found probable cause and issued the warrants. It is not relevant that here, unlike in *Sheppard,* the magistrate did not make changes in the warrant or expressly assure the agents that the warrant was adequate. Since the agents here did not use, and did not know that they used, an improper form, they had no reason to expect the magistrate to make changes in the warrant or to especially assure them of its adequacy.

Moreover, the warrant's authorization to seize "all corporate records" does not transgress the limitation on the good faith exception described by the Supreme Court as cases involving warrants "so facially deficient—*i.e.,* failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." 104 S.Ct. at 3422. Arguably, "all corporate records" is significantly more general than the "any controlled substance" language contained in the *Sheppard* warrant. 104 S.Ct. at 3427 & n. 2. Even so, this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it. This is not an instance in which "it is plainly evident that a magistrate or judge had no business issuing a warrant," *id.* at 3429 n. 7 (quoting *Illinois v.*

Gates, 462 U.S. 213 at ____, 103 S.Ct. 2317 at 2345, 76 L.Ed.2d 527). In addition, the investigating officers were told by a former C & A executive that Pinckard was a sham corporation. Every indication was that C & A officials were extensively involved in the kickback scheme. This type of complex financial fraud, sometimes referred to as the "paper puzzle," has been held to justify a more flexible reading of the fourth amendment particularity requirement. *See, e.g., United States v. Wuagneux*, 683 F.2d 1343, 1348-50 (11th Cir. 1982) (citing cases), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983).[5]

On the facts considered by the district court in deciding whether to grant the motion to suppress, the good faith of the officers would be established. However, we are mindful that at the time of the suppression hearing *Leon* and *Sheppard* had not been decided, and that the district court did not hold an evidentiary hearing on, nor in any way consider, the issue of the officers' good faith. Although the ultimate question of good faith *vel non* is a legal issue, which this court may resolve, the ascertainment of the facts upon which to base a determination regarding good faith is for the district judge. In *Leon*, the Supreme Court said that in determining whether a police officer acted in good faith, "all of the circumstances . . . may be considered." 104 S.Ct. at 3421 n. 23. It is not clear that we have had the opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue. Both parties should be given an opportunity to present evidence touching upon the conduct of the officers. We therefore feel it best to remand the case to the district court, where the parties

[5] In *Wuagneux* the court upheld a warrant that in part authorized the seizure of records of "the receipt and disbursement of kickback funds." *Wuagneux*, 683 F.2d at 1350-51. The court emphasized that despite the generality of this description, it was properly construed as referring to a very special detailed kickback scheme in view of the affidavit that accompanied it. *Id.* This reasoning reinforces the conclusion in the present case.

shall be afforded a hearing on the good faith issue. The district court, guided by *Leon* and *Sheppard*, and this opinion, then may determine whether the officers acted in good faith.

Accordingly, the order of the district court is VACATED and this case is REMANDED for proceedings consistent with this opinion.

THORNBERRY, Senior Circuit Judge, sitting by designation, concurring specially:

Since "[i]t is not clear that we have had an opportunity to consider all the circumstances in this case, as no evidentiary hearing was held on the good faith issue," and "[w]e therefore feel it is best to remand the case to the district court, where both parties shall be afforded a hearing on the good faith issue," I concur only in that portion of the court's opinion which supports the decision to remand the case to the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 81-230-CR-JWK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY ACCARDO, et. al.,

Defendants.

ORDER ON MOTION TO SUPPRESS
(Defendants DiFranco, P. Fosco, Norton and Pinckard)

The defendants Paul Fosco, James F. Norton, Paul A. Di Franco, and James Pinckard, have filed a joint motion to suppress evidence seized on October 6, 1976, from the offices of Consultants and Administrators, Inc., (C & A), and the offices of Pinckard and Associates, Inc., (Pinckard), as well as all fruits of these searches.

The government has filed a response in opposition to this motion, and the defendants have replied to the response. Because of the importance of the search warrant issue raised, the Court has accorded the appropriate parties full oral argument and an opportunity to supplement the memoranda already on file. After fully considering the matter and the authorities cited, the Court has determined that the challenged warrants were constitutionally flawed in that they were impermissible general warrants.

I.

Both of these searches were conducted pursuant to search warrants issued by Olga Jurco, United States Magistrate for the Northern District of Illinois, Eastern Division. The two warrants were issued by the Magistrate

on October 5, 1976, and were based upon a single affidavit, sworn to and signed by James W. Wagner, a Special Agent of the F.B.I.

It is apparently agreed by the parties that although this is a joint motion, the defendant Pinckard has standing to challenge only the search of Pinckard and Associates and its fruits, and the defendants Fosco, Norton, and DiFranco have standing only to challenge the search of C & A and its fruits.

A careful study of the motion and memoranda and argument of counsel indicates that the first issue raised by the defendants has sufficient merit to invalidate these warrants. Since the warrants are invalid on their faces, no evidentiary hearing is necessary for this determination.

The defendants argue that the two search warrants authorized a general, exploratory search. General warrants are, of course, prohibited by the Fourth Amendment, which requires a particular description of the things to be seized. The purpose of this requirement is to prevent "a general exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). A thorough explanation of the history behind the prohibition against the use of general warrants is found in the opinion of *Stanford v. State of Texas*, 379 U.S. 506 (1965) (see also cases cited at fn. 5, p. 510) and need not be repeated here.

II.

The C & A warrant authorized a search for:

> all corporate records of Consultants and Administrators, Inc.; a black and vinyl book, approximately six inches wide by twelve inches long, containing copies of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The Pinckard warrant authorized a search for:

> all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code.

The defendants claim that no probable cause was established by the supporting affidavit to believe that all of the corporate records were evidence and instrumentalities of crime, and that the warrants provided no guidance to the executing officers.

As a general principle, generic classifications in a warrant are acceptable only if no more precise description of the property to be seized is possible. *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981), *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980). It would be difficult to imagine language more generic than "all corporate records".

In this case the government contends that the affidavit for search warrant established probable cause to believe that the two corporations, C & A and Pinckard, conducted "no business which did not involve kickbacks", and that all of their records were therefore subject to search. The government asserts that it could not reasonably have been expected to specify what records were to be seized.

The affidavit for search warrant, however, clearly states that C & A operated clinics which provided medical, dental and vision services to union members and their families pursuant to contracts with specified labor unions. Pinckard, according to the affidavit, was paid by C & A to verify the eligibility of persons seeking health services from C & A under the union contracts. These are, of course, legitimate functions. Whether the individuals involved were giving and receiving kickbacks or not, those legitimate functions of the corporations, such as the application for and receipt of health services by union members, were presumably memoralized in corporate records not subject to seizure by the government.

On the other hand, the affidavit clearly establishes probable cause to search for certain kinds of corporate records, such as cancelled receipts and checks, expense accounts, bank statements, bids made by C & A for contracts with labor unions, notes or other records of meetings during which kickbacks, methods of payment, and recipients were allegedly discussed, and the like. It is alleged in the affidavit, for instance, that Pinckard determined the amount of its monthly bill to C & A by a telephone call from Pinckard to Milano. Milano stated the monthly total of premiums paid to C & A on its Chicago area contracts, and Pinckard would bill C & A for 10% of that amount. Any records memoralizing such telephone calls, such as actual telephone records or ledgers showing computations of the type described, would be subject to seizure. The specific item designated in the C & A warrant is an example of the particularity required. There was ample probable cause to seize a black vinyl book containing copies of certain documents, although it, however was apparently not discovered during the search. The envelopes and the United States currency were validly seized pursuant to the warrant. Everything else seized during these two searches was seized as a general "corporate record".

The Courts have been zealous to safeguard the property rights protected by the Fourth Amendment in the context of general warrants. Just recently the Fifth Circuit considered a search warrant authorizing the seizure of pirated cassette tapes of copyrighted films. The Court upheld the seizure as to films specified in the warrant, but not as to those seized under the generic description in the warrant of "cassettes on to which . . . copyrighted films . . . have been electronically transferred and recorded." The Court held that the warrant provided insufficient guidance to the searching agents when it authorized the search of illegally obtained films not specified in the affidavit. *United States v. Cook*, supra.

Surely the term "all corporate records" is far more general than authorization to search for certain specified

pirated cassettes and others of similar type. Furthermore, the government's contention that the challenged warrants were not general warrants because the objects to be seized left nothing to the discretion of the executing officers is simply without merit. It is no doubt true that the warrants authorized the seizure of "all corporate records" and an agent in possession of such a warrant need not discriminate between items to be seized and items to be left alone. But the Fourth Amendment prohibition against general warrants was designed to do more than prohibit discretionary searches by government agents. The requirement of particularity was not only to circumscribe the discretion of the executing officers, it was also to inform the person subject to the search and seizure what the officers are entitled to take. *Application of Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979).

The government has cited four cases in support of its claim that all of the records of a business permeated with fraud may be seized. The first is *National City Trading Corp. v. United States*, 635 F.2d 1020 (2d Cir. 1980). In that case the warrant specified numerous particular types of corporate records which could be seized. The claim was that these records may have included materials pertaining to legitimate legal records in a law office located within the business suite housing a commodities brokerage which was the subject of the search. The Court noted that the physical layout of the premises to be searched was described in great detail in the affidavit. Further, the affiant prepared a lengthy typed memorandum for the searching agents explaining that the search was not to reach the law practice. Finally, the Assistant United States Attorney also instructed the searching agents on the proper limitations of the search. The facts of the *National City Trading Corporation* case in which the search was upheld, are simply unlike this case. The warrants in that case was far more specific, and limiting instructions were given.

The government also cites *United States v. Bithoney*, 631 F.2d 1 (1st Cir. 1980). The warrant in that case

authorized the seizure of specific records pertaining to seventeen individuals. As the Court stated, the warrant:

> . . . undertook to narrow and identify the documents subject to seizure, breaking them down into specific categories. *Id.* at 2.

The government next cites *United States v. Brien*, 617 F.2d 299 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980). The warrant in that case authorized the seizure of:

> Lloyd Carr's bank statements, case [sic] receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists. *Id.* at 306.

The Court held:

> We hold that where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, *if they are, as here, accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized. Id.* at 309, (Emphasis added).

Finally, the government cites *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), *cert. denied*, 439 U.S. 896 (1978). Again, the warrants in the case were not general but were limited to documents and records pertaining to the efforts of the subject company to obtain confidential information from the telephone company.

A good summary of the law in this area is contained in *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980). The warrant in that case specified a search for:

> . . . certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001. *Id.* at 542.

Although the *Abrams* warrant was far more specific than those in this case, the Court discussed the law of such searches in great detail, noting that:

> Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in which a seizure of all records was held valid pursuant to a generally worded warrant such as we have here. In the cases we have canvassed where a seizure of records was upheld, there has been some limitation in the warrant as to the records to be seized. *Id.* at 545 (Citations omitted).

> The classic statement of the particularity required in search warrants was made by the Supreme Court of the United States in *Marron v. United States*, 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes *general searches* under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Many cases have come and gone since then, but this Court is unaware of any authorizing a search and seizure of "all corporate records," with no further description or limitation. If these warrants are upheld the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. Accordingly, it is this Court's considered judgment that the warrant is unconstitutionally general.

III.

The Court has also considered the remaining issues raised by the defendants, but finds none of them to require suppression. This Court finds probable cause in the affidavit to support a properly limited search of the two corporate

premises. Nor does the affidavit fail for lack of reliability on the part of the informant. Further, although the defendants contend, with supporting affidavits, that there are material false representations in the affidavit, the facts contested for the most part go to the general issues in the case and must await trial. Indeed, many of the claimed misrepresentations were made not by the affiant agent, but by the informant.

Finally, the defendants allege that the agents exceeded their authority in executing the warrant, in that they seized materials which were not even within the broad general category of all corporate records. The remedy in such situations is, of course, suppression if the government should attempt to introduce such items in evidence, and return of the property upon a proper motion.

IV.

For all of these reasons, it is thereupon

ORDERED AND ADJUDGED that this motion to suppress is GRANTED upon the basis that the warrants were impermissibly general, and all materials seized pursuant to these warrants, as well as all fruits of such seizures shall be suppressed, except as to the envelopes and the United States currency, both of which were properly described in the C & A warrant.

DONE AND ORDERED in chambers at Miami, Florida, this 19th day of February, 1982.

/s/ James W. Kehoe
United States District Judge

CC: Magistrate Sorrentino
All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5380

D.C. Docket No. 81-230

UNITED STATES OF AMERICA,

Plaintiff-Appellant, Cross-Appellee,

versus

ANTHONY ACCARDO, ET AL.,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby, VACATED; and that this cause be and

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

THORNBERRY, Senior Circuit Judge, sitting by designation, concurred specially and filed an opinion.

Entered: January 8, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: August 9, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5380

UNITED STATES OF AMERICA,

Plaintiff-Appellant, Cross-Appellee,

versus

JAMES PINCKARD,

Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING
(July 24, 1985)

Before GODBOLD, Chief Judge, HILL, Circuit Judge, THORNBERRY*, Senior Circuit Judge.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

REHG-4
(Rev. 6/82)

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* The Honorable Homer L. Thornberry, U.S. Circuit Judge for the Fifth Circuit, Sitting by Designation.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 208

UNITED STATES OF AMERICA,

vs.

The administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois

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SEARCH WARRANT

To Any Special Agent of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Consultants and Administrators, Inc., located on the second floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Consultants and Administrators, Inc.; a black vinyl book, approximately six inches wide by twelve inches long, containing copies of contracts, correspondence, bank statements and receipts; envelopes and United States currency which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed

on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME 4:45 P.M.

/s/ Olga Jurco
U.S. Magistrate

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Magistrate's Docket No.
Case No. 76 M 209

UNITED STATES OF AMERICA,

vs.

The administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Ill.

SEARCH WARRANT

To Any Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by James Wagner, Special Agent, Federal Bureau of Investigation that he has reason to believe that on the premises known as the administrative offices of Pinckard and Associates, Inc., located on the first floor of the two-story building at 220 South Ashland Boulevard, Chicago, Illinois in the Northern District of Illinois there is now being concealed certain property, namely all corporate records of Pinckard and Associates, Inc. which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18, United States Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this war-

rant and making the search in the daytime[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. The search, herein authorized, must be executed within the period of two days.

Dated this 5th day of October, 1976.

TIME _____

/s/ _____
U.S. Magistrate

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

STATE OF ILLINOIS 79 M 208
COUNTY OF COOK—SS: October 5, 1976

AFFIDAVIT

JAMES W. WAGNER, being duly sworn, states as follows:

I am a Special Agent of the Federal Bureau of Investigation and am currently investigating payments of money made by officers and employees of Consultants and Administrators, Incorporated and of Pinckard and Associates, Incorporated, in violation of Title 18, United States Code, Section 1954.

1. As recently as September 29, 1976, and on several occasions during the preceding week, I had personal conversations with Daniel G. Milano who provided me with the following information:

a. Milano is Secretary-Treasurer of Consultants and Administrators, Incorporated (hereinafter referred to as Consultants). He has been an officer of Consultants since the beginning of 1972. Previous to that time he was a paid employee of Consultants. Consultants is an Illinois corporation which has been in existence since 1970 and which presently has its administrative offices at 220 South Ashland Blvd., Chicago, Illinois. Consultants' other officers include: James Norton, president; Daniel Milano, executive vice-president (and Daniel G. Milano's father); Paul Fosco, vice president; and Ed Hurley, vice-president.

b. Through contracts with various labor unions, Consultants provides medical, dental and vision services to union members and their families. In the Chicago metropolitan area, these services are made available through three clinics which are owned and operated by Consultants. The clinics are located at 220 South Ashland Blvd., Chicago; 9071 West Higgins Road, Rosemont, Illinois; 6928 Wolf Road, LaGrange, Illinois. Consultants also owns and operates two clinics serving the same purposes in the Miami, Florida metropolitan area. Those clinics are:

Dental and Vision Care Centers, Inc., located at 16580 N.W. St., N. Miami, Florida and Consultants and Administrators of Florida, Inc., located at 4889 Lakeworth Road, Lakeworth, Florida.

c. Consultants presently has contracts with the following labor unions to provide the above-described services:

Laborers Union District Council, Chicago, Illinois
Southeast Florida Laborers Union District Council, Miami, Florida
Milk Drivers—International Brotherhood of Teamsters, Local 753, Chicago
Produce Drivers—International Brotherhood of Teamsters, Local 703, Chicago
News Drivers—International Brotherhood of Teamsters, Local 706, Chicago

Consultants' first union contract became effective June 1971 and its most recent became effective in early 1976.

d. Consultants pays two corporations to verify the eligibility of persons receiving services from Consultants under its union contracts. In Chicago, Pinckard and Associates, Incorporated (hereinafter referred to as Pinckard), is under contract to perform that function. Pinckard was incorporated in Illinois in September 1974. The president of Pinckard is James Pinckard and the only other corporate officer is his wife, Celeste Pinckard.

In Miami, Consultants has contracted with Fortune Services, Incorporated (hereinafter referred to as Fortune Services). Fortune Services was incorporated in Florida in June 1972. The officers of Fortune Services are: Sal Tracario, Bernard Rubin, John Giardello, Joseph Giardello and Seymour Gopman. The corporate office is located at the law office of Seymour Gopman in North Miami Beach, Florida. Milano further advised that neither Pinckard nor Fortune Services has any corporate activity beyond the scope of its respective contract with Consultants.

e. Based on personal observations and on conversations with his father (hereinafter referred to as Milano, Sr.),

Milano knows that the actual purpose for the incorporation of Pinckard and Fortune Services and for their contractual relationships with Consultants was to divert revenue from Consultants to be used to pay kickbacks. Milano knows from personal observations of James Pinckard that Pinckard verifies eligibility by merely placing telephone calls to the respective unions. Milano also knows from personal observations that Fortune Services has no employees and performs no services.

f. Based on his experience as an officer of Consultants and on personal conversations with Milano, Sr., Milano knows that Milano, Sr. is the only officer of Consultants who may authorize a bid to be made. Milano also knows that all bids made by Consultants, as well as by any other bidders, are supposed to be sealed bids, that is, information contained in each bid is not supposed to be available to any other bidders. Milano knows that Milano, Sr. meets with Al Pilotto and/or Angelo Fosco before Consultants submits a bid for a new or modified contract with a labor union, and that Milano, Sr. does not authorize a bid to be made by Consultants unless and until he has received the approval of Pilotto or Fosco. Furthermore, Milano, Sr. has received Pilotto's approval to submit Consultants' bid, but, on occasion, the bid has been restricted to certain health benefit services and not others, inasmuch as the approval to bid for the other services had already been given or would be given to some other entity. Milano also knows that Pilotto provides Milano, Sr. with information from other bidders, which information is used by Milano, Sr. in the preparation of Consultants' bids. Milano had advised me that Consultants has never made a bid which was not accepted.

g. Milano has attended several meetings (as described in f., supra), as recently as June 1976, and knows that the subject of kickbacks is discussed at the same time as the subject of a particular contract bid is discussed. Milano knows that the amount of kickback, method of payment and the intended recipients are agreed upon at such meetings.

h. From shortly after the incorporation of Pinckard until as recently as June 1976, Milano was responsible for the preparation and issuance each month of a check to Pinckard for its services. Milano knows that, before Pinckard sent its monthly bill to Consultants, James Pinckard contacted Milano and requested the monthly total of gross premiums paid to Consultants on its Chicago area union contracts. Consultants was thereafter billed by Pinckard in an amount representing 10 per cent of the amount Milano had provided James Pinckard. Milano further advised that during the first half of 1976, the monthly gross premium totals averaged $200,000 for Consultants' Chicago area contracts. Milano knows that this percentage paid to Pinckard was set by agreement between Milano, Sr. and Pilotto.

i. Milano knows from personal observations and conversations that James Pinckard's wife Celeste is the daughter of Al Pilotto. Furthermore, from the incorporation of Pinckard until as recently as June 1976, James Pinckard conducted the operations of Pinckard from a desk near Milano's desk on the second floor offices of Consultants at 220 South Ashland Blvd. in Chicago. Milano knows that Pinckard now has its offices on the first floor at the same address.

j. From shortly after its incorporation until as recently as June 1976, Milano was responsible for the preparation each month of a check to Fortune Services for its services. Milano knows that the Fortune Services bill to Consultants was always in an amount reflecting 15 per cent of the gross premium totals paid to Consultants on its Miami area union contracts. Milano knows from conversations with Milano, Sr. and personal observations that this percentage paid to Fortune Services was set by agreement between Milano, Sr. and Pilotto. Milano further advised that the Fortune Services checks were delivered to the law office of Seymour Gopman, and that Milano and/or Milano, Sr. often delivered the checks in person.

k. From the beginning of 1972 until as recently as July 1976, Milano delivered to M[illegible], Sr. $1,000 in cash from Milano's monthly salary. From personal observations of and conversations with them, Milano knows that each of the other officers of Consultants, excluding Milano, Sr., is required to make a cash payment each month of $1,000 to Milano, Sr. James Pinckard also makes the same monthly payment. Milano knows that Milano, Sr. collects this money at the beginning of each month, after salaries are paid, and places certain amounts in separate envelopes. Milano, Sr. designates the intended recipients of each envelope and, before their delivery, he places the envelopes in a drawer of his desk, located on the second floor of Consultants' offices at 220 South Ashland Blvd., Chicago. Milano knows that this money is a kickback to its recipients, who are Dominick Senese, Angelo Fosco, James Caporale and Al Pilotto. Milano has paid his $1000 in cash as recently as July 1976. Milano knows that his $1000 goes to Senese because Milano, Sr. has so advised him and, moreover, Milano has personally delivered his $1000 to Senese. Milano also has observed James Caporelli and Angelo Fosco personally visit Milano, Sr. at Consultants' offices and receive their envelopes from Milano, Sr. Milano also knows that his mother, Katherine Milano, is on Consultants' payroll as an employee for the purpose of diverting additional revenue to Milano, Sr. Mrs. Milano returns $1000 in cash from her monthly salary to her husband as his kickback.

l. Milano further advised that he left his job at Consultants in July 1976 due to threats made to him by Milano, Sr. concerning a family matter. At all times during his active employment at Consultants, Milano worked at a desk on the second floor of Consultants' offices at 220 South Ashland Blvd. He advised that he maintained there copies of Consultants' union contracts, correspondence, copies of bank statements and receipts in a black vinyl book, approximately six inches wide and twelve inches long. Milano further advised that Consultants' business files are maintained in file cabinets located in a storage

room on the second floor of Consultants' offices at 220 South Ashland Boulevard.

m. Milano knows that the two-story building at 220 South Ashland Blvd. in which Consultants has its offices is owned by the Milkdrivers Union Local 753, to which Consultants pays rent.

2. Special Agent Joseph Doyle of the Federal Bureau of Investigation advised me that on October 1, 1976 he observed the premises at 220 South Ashland Blvd., Chicago, and described those premises as a two-story building on the west side of the boulevard, the first-story facade being composed of red marble and pink brick and the second story of cement and glass. He further advised me that "Milk Drivers Union Local 753" appears on the glass above the main entrance and on the facade of the building above its main entrance.

3. Special Clerk James Moore of the FBI, Springfield, Illinois office, advised me that on October 4, 1976, he contacted Byron Allen, whom he personally knows is a corporate division clerk in the Illinois Secretary of State's office, Springfield, Illinois. Based on his review of official records, Allen advised him that Consultants and Administrators, Inc. was incorporated in the State of Illinois on December 5, 1969 with its then-stated purpose as being the administration of welfare plans. Special Clerk Moore further advised me that Allen advised him that Consultants' most recent report filed in 1976 listed Daniel Milano as the agent for the corporation, with an address of 220 South Ashland Blvd., Chicago, Illinois. The other officers listed are: James F. Norton, president; Daniel G. Milano, secretary-treasurer; and James F. Norton, Edward Hurley, Daniel G. Milano, Paul A. Fosco, Paul A. DiFranco, directors.

Special Clerk Moore further advised me that Allen advised him that Pinckard and Associates, Inc., was incorporated in the State of Illinois on October 29, 1974 with its then-stated purpose of performing the service of verifying eligibility of members of health and welfare pro-

grams. Special Clerk Moore further advised that Allen advised him that Pinckard's most recent report filed in 1976 listed James H. Pinckard as the agent for the corporation, with an address of 390 W. 11th Place, Chicago Heights, Illinois. James Pinckard is also listed as the president and director; Richard L. Hutchinson is listed as the secretary.

4. Investigative Clerk Eugene Herring of the Federal Bureau of Investigation, Jacksonvil. , Florida office, advised me that on October 5, 1976, he contacted Amy Kemp, whom he personally knows to be a Clerk in the Corporate Records Division of the Florida Secretary of State's office in Tallahassee, Florida. Based on her review of official records, Kemp advised him that Fortune Services, Incorporated was incorporated in the State of Florida in March, 1973. Kemp advised that the corporate charter was cancelled on September 3, 1976 for non-payment of annual reporting fees. The address on file for Fortune Services is 16870 Northeast 19th Avenue, North Miami Beach, Florida. The only director on file is Sabby Reich, whose address is the same. Kemp also advised Herring who advised me that Florida does not require the listing of the officers of a corporation. Furthermore, Kemp advised that Fortune Services did not file an annual report, as required, for any of its three years of existence as a Florida corporation.

5. Special Agent Gene McKinney of the FBI, Miami, Florida office, advised me on October 5, 1976 that he knows from personal observations that 16870 Northeast 19th Avenue, North Miami Beach, Florida is also the address of the law office of Seymour Gopman.

6. Special Agent William Thurman of the FBI advised me that on October 4, 1976 he contacted Gerald Johnson whom he personally knows to be Supervisory Compliance Officer of the United States Department of Labor, Labor Management Services Administration, Chicago office. Based on his review of the most recent Forms LM-2, (Labor Organization Annual Reports filed with the United States Department of Labor), Johnson advised him that

Dominick Senese is the president of Produce Drivers, International Brotherhood of Teamsters, Local 703, Chicago and that James Caporale is the secretary-treasurer and Alfred Pilotto is the vice-president of the Laborers District Council, Chicago.

Special Agent Thurman further advised me that Johnson further advised him on October 5, 1976, based on further review of Forms LM-2, that Alfred Pilotto is the president of Laborers International Union of North America, Local 5, Chicago.

7. Special Agent Raymond Maria of the Federal Bureau of Investigation, Miami, Florida office, advised me on October 5, 1976, that he knows from investigations of federal labor racketeering violations which he has conducted in the Miami area, that the following persons are associated with Laborers International Union of North America in Miami as follows: Bernard Rubin, former officer, Local 666; Sal Tracario, officer, Local 767; John Giardello, president, Local 767; and Joseph Giardello, business manager, Local 767.

8. Mary Alice Curtin, Compliance Officer of the United States Department of Labor, Washington, D.C., advised me by telephone on October 5, 1976, that, after reviewing official records, she has determined that Angelo Fosco is the president of Laborers International Union of North America, 905 16th Street, N.W., Washington, D.C.

9. For the reasons set forth herein, affiant has probable cause to believe that payments of money have been and are being made by officers and employees of Consultants and Administrators, Inc., and of Pinckard and Associates, Inc., through and by means of those corporations, in violation of Title 18, United States Code, Section 1954, and, furthermore, that (1) all corporate records of Consultants and Administrators, Inc., (2) a black vinyl book, approximately six inches wide and twelve inches long, containing copies of contracts, correspondence, bank statements and receipts, (3) envelopes and United States

currency, and (4) all corporate records of Pinckard and Associates, Inc. constitute evidence and instrumentalities of the alleged offense.

James W. Wagner
Special Agent
Federal Bureau of Investigation

Subscribed to and sworn before me
this ____ day of October, 1976.

OLGA JURCO
United States Magistrate

Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-518

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES PINCKARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-518

JAMES PINCKARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in vacating an order suppressing evidence seized under two search warrants.

On June 3, 1981, an indictment was returned in the United States District Court for the Southern District of Florida charging petitioners and 12 co-defendants with conspiracy to conduct the affairs of a labor union through a pattern of racketeering activities, in violation of 18 U.S.C. 1962(d). On February 19, 1982, the district court suppressed various records seized in warranted searches of two corporate entities operated by petitioners on the ground that the search warrants (Pet. App. 21-24) were impermissibly general in describing the evidence to be seized (Pet. App. 10-17).[1] The court of appeals, relying on *United States* v.

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[1]In reaching its decision, the district court expressly considered and rejected petitioners' alternate claims that the supporting affidavit failed to establish probable cause, that the affidavit was based on information

Leon, No. 82-1771 (July 5, 1984), and *Massachusetts* v. *Sheppard*, No. 82-963 (July 5, 1984), vacated the suppression order and remanded the case to the district court for a determination whether the officers acted in good faith in relying on the judicially-issued search warrants (Pet. App. 1-9).

Petitioners contend (Pet. 8-13) that the court of appeals' conclusion that this case "is within the good faith exception" (Pet. App. 7) and, accordingly, that it should be re-examined on that basis on remand conflicts with the principles enunciated in *Leon* and *Sheppard*. They further argue (Pet. 13-19) that the court of appeals improperly narrowed the inquiry on remand to the consideration of the officers' objective good faith in relying on the judicially-issued search warrants. Finally, petitioners complain (Pet. 19-22) that the court of appeals impermissibly issued an advisory opinion when it observed that "[o]n the facts considered by the district court in deciding whether to grant the motion to suppress, the good faith of the officers would be established" (Pet. App. 8).

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[2] In the first place, the court of appeals' decision did not definitively resolve the suppression issue. Rather, the case has merely been remanded for further proceedings — at which petitioners might prevail — to determine whether the seized evidence is admissible under a theory not previously considered by the district court. But beyond this, the court of

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provided by an unreliable informant, and that the affidavit contained material misrepresentations (Pet. App. 16-17).

[2]It is now over 52 months since the return of the indictment and over 41 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

appeals' decision places petitioners in no worse position than they would have occupied if the district court had denied their motion to suppress in the first instance. Even assuming that the district court ultimately rules the evidence is admissible, petitioners' contentions will be moot if they are acquitted following a trial on the merits. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

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[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.